

This claim involves one claimant and one respondent but two insurance carriers. The American Insurance Company (American) provided respondent's workers compensation insurance coverage from January 1, 2001 through December 31, 2001, followed by Wausau Underwriters Insurance Company (Wausau) which was respondent's

insurance carrier until December 31, 2002.¹ The date of claimant's accident is important, not only as it concerns which insurance company may be liable, but also because timely notice and written claim are disputed issues. The ALJ, however, did not reach those issues.

Respondent and American contend that the ALJ was correct and should be affirmed. But in the event the Appeals Board (Board) should find claimant's condition was work-related, respondent and American argue the evidence shows that claimant's accident date was either September, 2001, in which case claimant failed to give timely notice and written claim, or the date of accident was July 27, 2002, a date which falls outside American's coverage period.

Respondent and Wausau likewise argue that claimant's injuries did not arise out of his employment with respondent and, therefore, the ALJ's Order should be affirmed.

Findings of Fact and Conclusions of Law

Respondent is a metal recycling business. Claimant worked for respondent from sometime in 1994 until July 27, 2002. Claimant's job duties included weighing boxes of metal, sorting metal and getting the metal ready for shipping.

Claimant has been an insulin dependent diabetic since 1986. During the period of time relevant to this case, claimant's diabetes was described as "uncontrolled." In September 2001 claimant developed a blister on his left big toe which he attributed to pushing large boxes onto a scale to be weighed. Eventually, claimant sought medical treatment for the blister. Claimant attributes the failure of his blister to heal to his prolonged standing and walking at work. However, claimant acknowledged that he has continued to develop sores since being off work, including sores on his legs and a new ulcer on the second toe of his left foot which developed while claimant was remodeling his house and tearing down and re-building a garage at his home. Claimant started these home construction projects about the time that the blister first appeared on his big toe and continued that project even after he stopped working for respondent. By the time of his May 9, 2003 preliminary hearing testimony, claimant had not worked for respondent for almost ten months. At that time the sores on claimant's leg that had appeared while claimant was working for respondent had all healed and the diabetic ulcer on claimant's left great toe was almost healed.

¹ Since January 1, 2003, respondent's insurance carrier has been Commerce and Industry Insurance Company.

Judge Moore found "Claimant has failed to establish either that his employment caused his original blister or that his current need for treatment, if any, is related to his work duties for Respondent, as opposed to the progression of his diabetes, a non-work-related condition."² Claimant acknowledges his diabetes was "uncontrolled" and that was his reason for leaving work. Claimant is not alleging that his work with respondent caused or contributed to his diabetes. But claimant contends the constant standing and walking at work aggravated the diabetic ulcer on his foot and prevented it from healing. This contention is supported by the fact that claimant's physicians recommended he stop working and stay off his feet in order to give his foot ulcers time to heal. But claimant did not stay off his feet after he stopped working for respondent. Instead, he continued to perform manual labor type activities at his home including home remodeling and the work on his garage. With this in mind, it is impossible to determine from the record presented to date whether claimant's present condition and need for treatment is due to his employment with respondent, to his subsequent non-work-related activities or to the natural progression of his diabetic condition. Accordingly, the ALJ's decision should be affirmed.

WHEREFORE, the Order entered by Administrative Law Judge Bruce E. Moore on June 2, 2003, is affirmed and preliminary benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and Wausau Underwriters Ins. Co.
Roger E. McClellan, Attorney for Respondent and The American Insurance Co.
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² Order at 1.